Supreme Court, U.S.
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No. 06-980

In The

Supreme Court of the United States

JOHN K. COIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a guilty plea act as an automatic waiver of appeal from the denial of a pretrial motion to suppress, where the plea agreement is silent as to such waiver while specifically providing for waiver of certain other appellate rights, the parties contemplated and informed the Trial Court that there would be no such waiver, and the factual basis relies upon the evidence sought to be suppressed?

2. Does 18 U.S.C. §1465 unconstitutionally intrude upon the privacy rights and substantive due process rights of consumers of sexually oriented materials?

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United States v. Coil, 442 F.3d 912 (5th Cir., 2006).

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was entered on the 14th day of March, 2006. There was no petition for rehearing nor motion for extension of time to file petition for certiorari. The judgment of the Fifth Circuit is reviewable on certiorari under 28 U.S.C. §1254(1). Notification pursuant to Supreme Court Rule 29.4(b) is not required, as the United States is a party to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

   United States Constitution, Amendment I

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due proc[illegible] of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment V

3. 18 U.S.C. §1465, at App. 34.

STATEMENT OF THE CASE

The Court of first instance was the United States District Court for the Western District of Texas. That Court had jurisdiction pursuant to 18 U.S.C. §3231. The United States Court of Appeals affirmed Mr. Coil's conviction, and had jurisdiction under 28 U.S.C. §1291.

This is an appeal from a criminal case in which the Petitioner, John Kenneth Coil, was charged along with several family members and others in a thirty-two count superseding indictment with RICO (18 U.S.C. §1962(c)), RICO Conspiracy (18 U.S.C. §1962(d)), Klein conspiracy (18 U.S.C. §371), false statements (18 U.S.C. §1001), mail fraud (18 U.S.C. §1341), importation of obscene materials (18 U.S.C. §1462), interstate transportation of obscene materials (18 U.S.C. §1465), engaging in the business of selling or transporting obscene materials (18 U.S.C. §1466), income tax evasion (26 U.S.C. §7201), and false representation of social security number (42 U.S.C. §408).

The case was initially filed in the Western District of Texas, Waco division, the Honorable Walter Smith presiding. Judge Smith *sua sponte* reassigned the case to the docket of the Honorable Harry Lee Hudspeth.

Mr. Coil filed, among other things, two separate Motions to Suppress Evidence. While the Motions to

Suppress were pending, the United States Supreme Court issued its opinion in *Groh v. Ramirez,* 124 S. Ct. 1284 (2004), which case Petitioner felt was particularly applicable to the facts surrounding the search in this case. Petitioner therefore filed a supplement to his Second Motion to Suppress, bringing the new Supreme Court case to the attention of the District Court. Petitioner's Motions to Suppress were denied, App. 9 - 17, and Petitioner entered into a plea agreement with the Government, in which he agreed to plead guilty to one count of tax evasion and one count of transportation of obscenity in interstate commerce, and not to contest forfeiture of certain assets, in exchange for the Government moving to dismiss all other counts of the indictment. App. 18 - 24. Mr. Coil did not, as part of the plea agreement, waive his right to appeal the denial of pretrial motions or other matters. *Id.*; App. 36 - 37. He did agree to waive the appeal of the agreed forfeitures incorporated in the plea agreement. App. 21 - 22. The factual basis for the plea relied heavily upon evidence that was seized pursuant to the warrants that Mr. Coil had earlier contested, App. 30, and evidence developed as a direct result of the execution of those warrants.

On appeal, Petitioner raised several sentencing issues, contested the denial of his pretrial Motions to Suppress, and raised for the first time the issue of whether 18 U.S.C. §1465 unconstitutionally invades the privacy of consumers of adult materials, including obscene materials. The United States Court of Appeals for the Fifth Circuit vacated Mr. Coil's sentence and remanded for re-sentencing, but refused to address the merits of Mr. Coil's Fourth Amendment issues, holding that, "An unconditional guilty plea waives all non-jurisdictional defects in the trial court proceedings. An erroneous pretrial ruling is a non-jurisdictional

defect that is waived by an unconditional guilty plea." App. 3 - 4 (citations omitted.). The Court of Appeals further rejected Mr. Coil's privacy claim, holding that while he had standing to raise the issue on behalf of consumers, "In the absence of a contrary ruling from the Supreme Court, *Stanley's* progeny upholding the constitutionality of obscenity laws against attacks based on both the First Amendment and substantive due process controls our resolution of Coil's claims." App. 8. This petition followed.

ARGUMENT

Question 1: Does a guilty plea act as an automatic waiver of appeal from the denial of a pretrial motion to suppress, where the plea agreement is silent as to such waiver while specifically providing for waiver of certain other appellate rights, the parties contemplated and informed the Trial Court that there would be no such waiver, and the factual basis relies upon the evidence sought to be suppressed?

Despite the line of cases relied on by the Fifth Circuit, a guilty plea does not under all circumstances meet the definition of a "waiver" set out by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There, this Court defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Id.*

Since *Johnson,* this Court has repeatedly held that, where a defendant voluntarily enters a guilty plea on the advice of counsel, he may not thereafter raise independent claims related to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *Tollett v. Henderson,* 411 U.S. 258, 267 (1973); *and see Brady v.*

United States, 397 U.S. 742 (1970); *McMann v. Richardson,* 397 U.S. 759 (1970); *Parker v. North Carolina,* 397 U.S. 790 (1970). Each of these cases involved a writ of habeas corpus filed by the defendant after having entered a plea of guilty. In each of these cases, the defendant sought to raise, via collateral attack, an issue of the deprivation of a constitutional right *that had never been raised prior to the guilty plea.* This Court determined in each of those cases that the issue to be focused upon in a habeas proceeding is not whether there existed a constitutional violation, but rather whether the entry of the plea was voluntary. *Tollett,* 411 U.S. at 266; *McMann,* 397 U.S. at 770-771; *Brady,* 397 U.S. at 750; *Parker,* 397 U.S. at 797-798.

This Court's holding in *Tollet* is especially instructive, noting that once a guilty plea has been entered, the defendant may not *thereafter* raise issues of constitutional deprivation that occurred prior to the entry of the guilty plea. *Tollett,* 411 U.S. at 267. Mr. Coil, unlike the habeas petitioners in the *Tollett/Brady* line of cases, raised the issue of deprivation of constitutional rights prior to entering his plea, and sought review of the trial court's decision on direct appeal, rather than on collateral attack. Therefore, the only issue in this case is whether the guilty plea acted as a subsequent waiver of the right to appeal the trial Court's ruling on that issue, consistent with *Johnson v . Zerbst, supra.*

This Court specifically noted in *Tollett* that it was not deciding the issue on waiver grounds, but under the law of collateral attack, and that indeed, under the analytical framework of waiver, Tollet would have prevailed. "If the issue were to be cast solely in terms of 'waiver,' the Court of Appeals was undoubtedly correct in concluding that

there had been no such waiver here." *Tollett v. Henderson,* 411 U.S. 258, 266 (1973).

Despite this clear language, the Fifth Circuit has created a line of cases, relying in part on the *Tollett/Brady* cases, holding that even on direct appeal, "A voluntary guilty plea waives all non-jurisdictional defects in the proceedings against the defendant." *See, e.g., United States v. Williams,* 61 Fed. Appx. 120, 2003 WL 342277, at 1 (5th Cir., 2003), *citing Tollett v. Henderson,* 411 U.S. 258, 267 (1973); *United States v. Smallwood,* 920 F.2d 1231, 1240 (5th Cir., 1991), *citing Tollett v. Henderson,* 411 U.S. 258, 267 (1973). These cases quite clearly read *Brady* and its progeny too broadly. Nor has undersigned counsel been able to locate any case from this Court that would support such a far-reaching proposition.

Another and independent line of cases from the Fifth Circuit standing for essentially the same proposition, but on different reasoning, pre-dates *Brady,* and appears to be founded on the reasoning that, because the guilty plea is an admission of all the elements of the offense, the erroneous denial of a motion to suppress or other constitutional defects are essentially harmless, because the evidence complained of is not used against the defendant. *See, e.g., United States v. Bell,* 966 F.2d 914, 915 (5th Cir., 1992; *Barrientos v. United States,* 668 F.2d 838, 842 (5th Cir., 1982); *United States v. Jackson,* 659 F.2d 73, 73-74 (5th Cir., 1981); *United States v. Saldana,* 505 F.2d 628 (1974); *United States v. Bendicks,* 449 F.2d 313, 315 (5th Cir., 1971).

The Fifth Circuit in this case appears to have relied on both lines of cases, citing *United States v. Bell,* 966 F.2d 914, 915 (5th Cir., 1992) (which relies on the pre-*Brady*

line of Fifth Circuit cases), and *United States v. Wise,* 179 F.3d 184, 186 (5th Cir., 1999) (which relies on the *Tollett/Brady* line of cases). App. 3 - 4.

As argued above, the Fifth Circuit's interpretation of the *Tollet/Brady* cases is far too broad, attempting to fit the square peg of collateral attack analysis into the round hole of a direct appeal situation where the issue sought to be reviewed was raised prior to trial.

Similarly, the reasoning supporting *Barrientos, Jackson, Saldana,* and *Bendicks* does not apply to Mr. Coil's situation. Unlike those defendants, Mr. Coil raised the issue of suppression prior to trial, and after suppression was denied, the very evidence that he sought to suppress was made a part of the factual basis of his plea. App. 30. Because a guilty plea must be supported by a factual basis, the erroneous consideration of illegally obtained or tainted evidence as part of the factual basis affects the proceeding every bit as much as erroneous admission of that same evidence would affect a jury trial. And, just as in a jury trial, Mr. Coil did everything necessary to preserve that error, objecting to it prior to the bench trial and securing an adverse ruling.

Because neither the *Tollett/Brady* reasoning nor the *Barrientos* reasoning applies to Mr. Coil's case, the only remaining issue is whether he did, in fact, waive his right to appeal pursuant to *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); that is, whether he intentionally relinquished a known legal right.

A plea bargain is contractual in nature. *Santobello v. New York,* 404 U.S. 257 (1971). The contract at issue here not only contains no express waiver of Mr. Coil's right to appeal his conviction, App. 18 - 24, it actually does contain

an express waiver of other appellate rights. App. 21 - 22. It is therefore clear that the parties contemplated the waiver of appellate rights, and included express provisions as to which rights would be subject to waiver under the agreement. Further, to the extent that silence on this issue is ambiguous, the parol evidence tends to show that the parties did not intend for Mr. Coil to waive his right to appeal the denial of his pretrial motion to suppress.

> THE COURT: And the plea agreement, which I just saw at the last minute, does it contain a waiver of appeal, or not?
>
> MR. FAHLE [for the Petitioner]: It does not, your Honor, only just as in John A. Coil's: it's only as to the forfeiture issues.
>
> MR. MARSHALL [for the Government]: That's correct.
>
> THE COURT: All right. No waiver of appeal from the sentence imposed in the case is what I was getting at.

App. 36 - 37.

Under these circumstances, it cannot be said that Mr. Coil knowingly relinquished or abandoned his right to appeal the denial of his pretrial Motions to Suppress.

Question 2: Does 18 U.S.C. §1465 unconstitutionally intrude upon the privacy rights and substantive due process rights of consumers of sexually oriented materials?

18 U.S.C. §1465 prohibits the interstate transportation of obscene matters for sale or distribution. As at least one federal Court has recognized, this regulation affects

the fundamental rights of privacy and free speech under the First and Fifth Amendments to the United States Constitution, and the government lacks any compelling interest in regulating the distribution of obscene materials to consenting adults since the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003). *United States v. Extreme Associates, Inc.*, 352 F.Supp.2d 578 (W.D. Pa., 2005), *rev'd* 431 F.3d 150 (3d Cir., 2005).

Petitioner has standing to raise this issue as a vendor of adult materials, asserting the privacy rights of those who would purchase such materials. *See Carey v. Population Services Int'l,* 431 U.S. 678, 682 - 684 (1977); *Williams v. Atty. General of Ala.,* 378 F.3d 1232, 1234 n. 3 (11th Cir., 2004).

This Court held in 1957 that obscenity was not within the area of constitutionally protected speech under the First Amendment. *Roth v. United States,* 354 U.S. 476, 485 (1957). Twelve years later, however, this Court held that the state could not make the private possession of obscenity in one's home a crime. *Stanley v. Georgia,* 394 U.S. 557, 568 (1969). In so doing, the Court explicitly stated that the right to read, observe, or think about what one pleases in his own home, including obscene material, is "fundamental to our scheme of individual liberty." *Stanley,* 394 U.S. at 568. There is thus no question that this privacy right is a fundamental right, for purposes of substantive due process review.

Nor has this Court ever held otherwise, though it has repeatedly rejected *First Amendment* challenges to statutes criminalizing the distribution of obscenity even to consenting adults, *see, e.g., United States v. Reidel,* 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363

(1971); *United States v. 12 200-foot Reels of Super 8mm Film,* 413 U.S. 123 (1973); *United States v. Orito,* 413 U.S. 139 (1973). In each of these cases, this Court held that the First Amendment does not protect obscenity, and that therefore the First Amendment cannot confer or protect any right to distribute obscenity.

However, in none of these cases was this Court called upon to determine whether the fundamental right to privacy called for strict scrutiny of any statutes criminalizing the transportation or distribution of obscenity involving only consenting adults. The fact that obscenity statutes have withstood challenge under one constitutional provision does not make them immune to all forms of constitutional attack. *See, e.g., Boos v. Barry,* 685 U.S. 312 (1988) (holding that statute did not violate the equal protection clause, but did violate the First Amendment); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 - 384 (1992) (holding that fact that obscenity is not protected speech under the First Amendment does not make it "entirely invisible to the Constitution.")

Since the statute affects a fundamental right, i.e., privacy, it is subject to analysis under strict scrutiny. The question, then, is whether 18 U.S.C. §1465 is narrowly tailored to serve a compelling governmental interest.

In *Lawrence,* this Court found that the liberty interest one has in making decisions about one's own sexual encounters with other consenting adults cannot be violated based simply on the government's "interest" in controlling the morality of its citizenry. *Lawrence,* 539 U.S. at 578. As Judge Lancaster points out in *Extreme Associates, supra,* it is not entirely clear whether the Supreme Court in *Lawrence* was analyzing the Texas sodomy

statute under strict scrutiny, or under a rational basis test. But it doesn't matter for purposes of this analysis, because whichever it was, this Court found that the state's interest in promoting a moral code was insufficient to justify the intrusion on the citizen's liberty. Thus, if that governmental interest is not strong enough to justify a statute under a rational basis test, it surely must also fail strict scrutiny.

Because the fundamental right to privacy recognized in *Stanley* applies even to obscene materials, there is no question that the right affected by 18 U.S.C. §1465 – as opposed to the "liberty interest" referred to by this Court in *Lawrence* – is a fundamental right demanding strict scrutiny of any statute touching upon it.

Indeed, the dissenters in *Lawrence* pointed out that the impact of the opinion would be to call into question the constitutionality of obscenity laws. *Lawrence,* 539 U.S. at 590 (Scalia, J., dissenting). Other constitutional scholars agree. *See, e.g.,* Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name,* 117 HARV. L. REV. 1893, 1945 (2004); (stating that " . . . the Court's holding in *Lawrence* is hard to reconcile with retaining the state's authority to ban the distribution to adults of sexually explicit materials identified by, among other things, their supposed appeal to what those in power regard as "unhealthy" lust, or the state's power to punish adults for enjoying such materials in private, whether alone or in the company of other adults"); James W. Paulsen, *The Significance of Lawrence,* 41 HOUS. LAW. 32, 37 (2004) (stating that, "[a]fter *Lawrence*, any law that can be justified only because 'most people think that sort of thing is immoral' may be in constitutional trouble"; Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny,* 6 U. PA. J. CONST. L. 945, 964-65 (2004) (noting that

obscenity laws will be void under *Lawrence* if the decision stands for the idea that moral disapproval is insufficient justification to infringe upon an individual's liberty); Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards,* 9 COMM. L. & POLICY 25, 25 (2004) (stating that First Amendment principles favoring autonomy and the *Lawrence* decision " . . . point toward elimination of obscenity law entirely"); *see also* Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People,* 39 TULSA L. REV. 95, 145-148 (2003) (noting Justice Scalia's prediction, but stating that *Lawrence* will not serve as the basis to invalidate all "morality" laws; however, upon application of the decision to the area of obscenity laws, the author concludes that after *Lawrence* the government could only proscribe child pornography due to the independent governmental interest in protecting the children involved in its production).

The conviction on this Count should be vacated, and the case reversed and rendered as to this count.

Respectfully Submitted,

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442 F.3d 912

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51110

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN KENNETH COIL,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(Filed Mar. 14, 2006)

Before HIGGINBOTHAM, DAVIS and STEWART, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

John Kenneth Coil appeals his conviction and sentence following unconditional guilty pleas to charges of a violation of 18 U.S.C. § 1465 for transportation of obscene materials in interstate commerce for sale or distribution, and a violation of 18 U.S.C. § 1341 for mail fraud by mailing a false IRS Form 1040. Coil argues on appeal that the District Court erred by (1) imposing a sentence above the statutory maximum and in violation of Booker; (2) denying Coil's motions to suppress evidence obtained

pursuant to a search warrant which Coil claims is facially invalid; and (3) enforcing 18 U.S.C. § 1465, which Coil claims is unconstitutional under *Lawrence v. Texas,* 539 U.S. 558 (2003). We disagree that the district court erred in denying the motions to suppress or in enforcing § 1465, and therefore affirm Coil's conviction. We agree with Coil, however, that we should vacate Coil's sentence and remand for resentencing in light of *Booker* and the relevant statutory maxima.

I.

Coil first argues, in reliance on *United States v. Booker,* 543 U.S. 200 (2005), that the district court violated the Sixth Amendment in imposing enhancements to his sentence under a mandatory Guidelines scheme based on facts not admitted by him or found by a jury beyond a reasonable doubt. Because Coil preserved his claim of *Booker* error by making a proper objection, and the Government concedes that the error was not harmless, we vacate the sentence and remand for resentencing. *See United State v. Pineiro,* 410 F.3d 282, 284 (5th Cir. 2005).

Coil also argues that the district court erred in imposing a sentence above the statutory maxima. The district court imposed a sentence of 63 months on the mail fraud count, noting that this was the lower end of the guidelines calculation. The court ordered the sentence to run concurrently with the 60- month term of imprisonment imposed for the obscenity count. The district court acknowledged that the statutory maximum was 5 years on the obscenity count, but failed to note that the same statutory maximum applied to the mail fraud offense as well. The Government concedes that the 63-month sentence imposed for the mail

fraud count exceeds the statutory maximum of 60 months, as provided in § 1341 at the time of the offense. This error is plain and affects Coil's substantial rights and also affects the fairness, integrity, and public reputation of judicial proceedings. *See United States v. Olano,* 507 U.S. 725, 731-37 (1993). Therefore, even if remand and resentencing were not warranted on the basis of the *Booker* error discussed above, we would vacate and remand for resentencing on the mail fraud offense within the statutory limits.

II.

Coil next argues that the district court erred in denying his motions to suppress evidence recovered pursuant to a warrant he claims was facially invalid. The government argues that Coil waived the right to challenge the denial of his motions to suppress by entering an unconditional guilty plea.[1] As the government argues, the issue of whether Coil reserved the right to appeal the District Court's denial of his motion to suppress was not raised at rearraignment. The written plea agreement does not reserve the right to challenge the denial of the motions to suppress.

An unconditional guilty plea waives all non-jurisdictional defects in the trial court proceedings. *United States v. Bell,* 966 F.2d 914, 915 (5th Cir. 1992). An erroneous pretrial ruling is a non-jurisdictional defect that is

[1] Although Coil claims in his original brief that in his plea agreement he did not "waive his right to appeal the denial of pretrial motions or other matters," he has not filed a reply brief or challenged the government's assertion that he did not enter a conditional plea or otherwise preserve an appeal of the denial of his motions to suppress.

waived by an unconditional guilty plea. *See United States v. Wise,* 179 F.3d 184, 186 (5th Cir. 1999) (denial of motion to suppress waived by unconditional guilty plea). A district court need not inform defendant that his guilty plea operates as a waiver of the right to appeal non-jurisdictional pretrial rulings. *Id.* at 186-87.

The record does not reflect any reservation by Coil of the right to challenge the district court's evidentiary ruling on appeal. Coil waived the right by entering an unconditional guilty plea, and therefore we will not consider the merits of his argument. *See Bell,* 966 F.2d at 915-17.

III.

Coil argues, for the first time on appeal, that 18 U.S.C. § 1465 – the statute under which he was convicted for transportation of obscene materials for sale or distribution – is unconstitutional in the wake of the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003). He argues that § 1465 violates the substantive due process rights of individuals to possess obscene materials in their homes, a fundamental right to privacy he contends was established in *Stanley v. Georgia,* 394 U.S. 557, 568 (1969). Coil asserts that he has standing to challenge the constitutionality of § 1465 because he is a vendor of adult materials, asserting the privacy rights of those who would purchase such materials.[2]

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[2] Although the government does not concede that Coil has standing to assert the privacy rights of those would purchase his obscene materials, it does not offer a serious argument to rebut standing. The Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers' behalf

(Continued on following page)

Coil asserts that neither the Supreme Court nor this court have addressed "whether the fundamental right to privacy called for strict scrutiny of any statutes criminalizing the transportation or distribution of obscenity involving only consenting adults." Instead, Coil takes the position that *Stanley* and its progeny, i.e., *United States v. Reidel,* 402 U.S. 351 (1971), *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363 (1973), *United States v. 12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), *United States v. Orito,* 413 U.S. 139 (1973), and *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), were decided solely on First Amendment Ground, rather than on privacy grounds under the Substantive Due Process Clause. Coil relies heavily on the reasoning of an opinion of the United States District Court for the Western District of Pennsylvania, since reversed, holding that § 1465 affects the fundamental rights of privacy and free speech under the First and Fifth Amendment, and that, after *Lawrence,* the government lacks any compelling interest in regulating the distribution of obscene materials to consenting adults. *United States v. Extreme Assocs.,* 352 F. Supp. 2d 578, 595-96 (W.D. Pa. 2005), *rev'd,* 431 F.3d 150 (3d Cir. 2005).

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where those statutes are directed at the activity of the vendors. *See, e.g., Carey v. Population Services International,* 431 U.S. 678, 682-84 (1977) (holding that a mail-order seller of non-medical contraceptives had standing to argue that a state statute prohibiting the distribution of non-medical contraceptives violated its customers' substantive due process rights to use such contraceptives); *Craig v. Boren,* 429 U.S. 190, 195, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that a beer seller had standing to challenge a state statute on behalf of certain underage customers); *see also United States v. Extreme Assocs., Inc.,* 431 F.3d 150, 155 (3d Cir. 2005) (holding that vendor of obscene materials had standing to challenge federal obscenity statute on behalf of customers).

As Coil concedes, because he failed to raise this issue in the district court, review is for plain error. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1420 (5th Cir. 1996) (en banc); *see also United States v. Knowles,* 29 F.3d 947, 950 (5th Cir. 1994) (review is for plain error when defendant fails to raise a constitutional challenge to a penal statute in the district court). To establish plain error, Coil must show that (1) there is an error, (2) the error is clear or obvious, and (3) the error affects his substantial rights. *See United States v. Olano,* 507 U.S. 725, 731-37 (1993). A conviction based upon an unconstitutional statute is both "plain" and "error." *Knowles,* 29 F.3d at 951.

The Third Circuit addressed precisely the argument proffered by Coil when it reversed the decision upon which Coil primarily relies. See *United States v. Extreme Assocs.,* 431 F.3d 150, 155-59 (3d Cir. 2005). Our sister circuit's conclusion rested in relevant part on two points.

First, we are commanded by the Supreme Court that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477, 484 (1989). The Court reaffirmed this command in *Agostini v. Felton,* 521 U.S. 203, 237 (1997), stating, "[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."

The Fifth Circuit has consistently followed the Supreme Court's admonition in *Rodriguez* and *Agostini. See, e.g., Singer v. City of Waco,* 324 F.3d 813, 817-18 (5th Cir.

2003), *rehearing and rehearing en banc denied,* 67 Fed. Appx. 250 (5th Cir. Apr. 22, 2003), *and cert. denied,* 540 U.S. 1177 (2004); *U.S. v. Rodriguez-Montelongo,* 263 F.3d 429, 434-35 (5th Cir. 2001); *Randell v. Johnson,* 227 F.3d 300, 301 (5th Cir. 2000), *cert. denied,* 532 U.S. 971 (2001). We apply the same rule to Coil's claim.

Second, the Supreme Court has consistently and explicitly upheld the constitutionality of federal statutes regulating the distribution of obscenity in cases following Stanley. *See Reidel,* 402 U.S. at 351; *Thirty-Seven Photographs,* 402 U.S. at 363; *Orito,* 413 U.S. at 139; *12 200-Ft. Reels,* 413 U.S. at 123. The Court has stated clearly that the right recognized in *Stanley* to possess obscene material within the home "does not mean" that there is a correlative right to distribute that material, *Thirty-Seven Photographs,* 402 U.S. at 376, and that it "does not require" the Court to fashion a right to distribute, *Reidel,* 402 U.S. at 356.

The Court most emphatically rejected Coil's theory in *Paris Adult Theatre,* where it concluded:

> If obscene material . . . carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that a man's home is his castle. . . . Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes.

Paris Adult Theatre, 413 U.S. at 66. Finally, the Court indicated it had "reaffirmed [its] holding" that "commerce

in obscene material is unprotected by any constitutional doctrine of privacy." *Id.* at 69.

In the absence of a contrary ruling from the Supreme Court, *Stanley*'s progeny upholding the constitutionality of the obscenity laws against attacks based on both the First Amendment and substantive due process controls our resolution of Coil's claims. We agree with the Third Circuit that the Supreme Court's decision in *Lawrence* does not render § 1465 unconstitutional, and we therefore affirm his conviction.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
v.	§	No. W-03-CR-197
JOHN KENNETH COIL, et al.	§	

ORDER REGARDING JOHN KENNETH COIL'S MOTION TO SUPPRESS EVIDENCE

(Filed Feb. 27, 2004)

Defendant John Kenneth Coil and six others are charged in a thirty-two count indictment with numerous offenses, including mail fraud, income tax evasion, racketeering conspiracy, and importing and transporting obscene matter. He has filed a motion to suppress all fruits of the search of his corporate offices on December 13, 1999. An evidentiary hearing was held on the motion to suppress evidence, and the Court's findings and facts and conclusions of law are incorporated in this opinion.

In the year 1999, special agents of the Internal Revenue Service were conducting an investigation into the possible tax liabilities of Defendant John Kenneth Coil, various members of his family, and various corporate entities with which he was associated. Information in the possession of the Internal Revenue Service indicated that Defendant Coil was receiving substantial income from the operation of various book stores, video stores, and arcades specializing in "adult" materials. They also had information concerning various real estate transactions which might have resulted in substantial taxable income. They also had information that Coil was

concealing and transferring assets for the purpose of evading and defeating income taxes due and owing to the United States. They also became aware that Coil maintained a corporate office on Long Prairie Road in Flower Mound, Texas. Believing that this office building would contain documentary evidence relative to the suspected tax evasion scheme or schemes, Special Agent Brooks of the Internal Revenue Service prepared an affidavit for a search warrant. Since Special Agent Brooks believed that the building was located in Denton County, Texas, within the Eastern District of Texas, the affidavit and application for a search warrant was presented to a United States Magistrate Judge for the Eastern District of Texas in Sherman, Texas. The magistrate judge issued the warrant on December 9, 1999, providing that it be executed within ten days and in daytime only.

On December 13, 1999, at approximately 10:00 a.m., special agents of the Internal Revenue Service arrived at 111 Long Prairie Road in Flower Mound, Texas, to execute the search warrant they had obtained for the search of the Defendant's building. The agents knocked on the door and announced their authority and purpose. The door was opened by Antonia Perez, the Defendant's receptionist, who was the only person present in the building. Defendant Coil was out of town on a trip. The agents told Ms. Perez that they were there to seize records pursuant to the search warrant. They gave her an opportunity to make a telephone call, but she replied that she had no one to call (apparently she did not know how to reach Defendant Coil by telephone).

At this point, something unexpected happened. One of the agents, noticing a nearby boundary sign, raised a question as to whether the building was located in Denton

County, as they had believed, or in Tarrant County. If the building were in Tarrant County, that location was within the Northern District of Texas, not the Eastern District of Texas. The agents telephoned the Flower Mound Police Department, which dispatched an officer to the scene. The local police officer was not certain, but expressed the belief that the building was probably in Tarrant County. The agents then telephoned an Assistant United States Attorney for instructions. The AUSA advised the agents to represent the application and affidavit to a magistrate judge for the Northern District of Texas, and to obtain a second search warrant. Accordingly, Special Agent Brooks, the original affiant, presented his application and affidavit to Magistrate Judge Sanderson of the Northern District of Texas. By this time, another point of confusion had been introduced, in that the agents had been advised that the correct street address of Defendant's building was 107 Long Prairie Road, not 111 Long Prairie Road. This slight change of address was incorporated in the new affidavit and search warrant. The new search warrant was issued by Magistrate Judge Sanderson at 2:30 p.m. on December 13, 1999. The new search warrant ordered execution on or before December 17, 1999, and did not specify daytime or nighttime.

During the several hours that passed before word of the new search warrant was received, one special agent remained inside the building to make sure that the receptionist, Ms. Perez, did not tamper with any records. Other special agents remained outside, guarding the perimeter. When word was received around 2:45 p.m. that a new warrant had been issued, the search commenced in earnest. At about 3:45 p.m., Ms. Perez left the building returning about 4:30 p.m. At 6:00 p.m., Ms. Perez left for the day,

while the search continued. The agents left the building about 11:00 p.m., taking with them many files and records and leaving behind a copy of the search warrant and an inventory.

The Defendant's attacks on the search and seizure fall into two categories: claims that the search warrant itself was deficient and claims relating to the manner of its execution. Within the first category, the Defendant contends that the warrant fails to describe properly the place to be searched. This contention focuses on the confusion concerning the street address of the Defendant's building. As noted earlier, the application for a search warrant presented to the magistrate judge in Sherman represented that the building was located in Denton County and that the street address was 111 Long Prairie Road, Flower Mound, Texas. Upon attempting to execute the search warrant, the agents were informed not only that the building lay in Tarrant County, Texas, but that the correct street address was 107 Long Prairie Road, Flower Mound, Texas. Even years later, at the hearing on the Defendant's motion to suppress evidence, there was disagreement as to the correct street address. Having reviewed the property description in the search warrant affidavit, however, the court concludes that these discrepancies are not material. Of course, the Warrant Clause of the Fourth Amendment allows only search warrants "particularly describing the place to be searched . . . ". U.S. Constitution, amend. IV; **Maryland v. Garrison**, 480 U.S. 79, 85 (1987). This requirement is met if the property description in the search warrant is sufficient to permit an officer executing the warrant to ascertain and identify the place to be searched with reasonable certainty. **Steele v. United States**, 267 U.S. 498, 503 (1925) (garage complex with

street addresses of 609 and 611 Forty-sixth Street); **United States v. Jones**, 208 F.3rd 603, 608 (7th Cir. 2000) (typographical error listing 2269 S. 9th Street instead of 2268 S. 9th Street); **United States v. Valentine**, 984 F.2d 906, 909 (8th Cir. 1993) (address listed as 3048 Thomas instead of 3050 Thomas). In the instant case, attachment A to the search warrant describes the target premises as "a green single story, cinder block and wood structure with a composition roof" displaying above its door a sign with the words "Gene's One Stop". The property is further described as being located on the north side of Long Prairie Road across from a convenience store, and approximately 8/10th of a mile east of the Grapevine lake dam spillway. Evidence, including photographs, introduced at the hearing on the motion to suppress evidence clearly established that this description was both accurate and sufficient to identify with particularity the premises to be searched (Defendant's Exhibits 1 and 3). Mere technical errors in particularity are not enough to invalidate a search warrant. **Valentine**, 984 F.2d at 909.

The Defendant mounts a broader attack on the sufficiency of the warrant by asserting the following claims: that it is so broad as to constitute an unconstitutional "general warrant"; that it authorizes the seizure of items which are neither contraband nor evidence of a crime; that the affidavit in support of the warrant fails to show probable cause to believe that the Defendant was importing, transporting, or selling obscenity; and that the items to be seized could have and should have been described more specifically. In dealing with these contentions, it might be helpful to begin at the beginning. The investigation which led to the issuance of the search warrant was primarily a tax investigation conducted by special agents

of the Internal Revenue Service. It apparently began with the receipt of information that the Defendant, who operated retail stores and arcades specializing in "adult" materials, was skimming profits and attempting to evade the payment of income taxes on all the income generated by these businesses. The affidavit in support of the warrant, which is quite lengthy and detailed, contains substantial credible evidence which could lead a reasonable person to conclude that the Defendant, using various family members, nominees, corporations and other business entities had been attempting over a period of years to evade and defeat the payment of taxes by failing to file income tax returns, by filing false income tax returns, and by transferring and concealing assets in order to evade and defeat the payment of taxes. The specific items for the seizure of which the warrant was ultimately issued (Property List, Attachment B) could reasonably constitute evidence of these crimes and/or instrumentalities of their commission. Although the financial records which the warrant authorizes to be seized are voluminous, the affidavit indicates that the transactions under scrutiny were also voluminous. Under the circumstances, the Defendant's contention that the warrant was too general and fails to describe the items to be seized with sufficient specificity must be rejected.

The Defendant next contends that the warrant is deficient in that the affidavit was insufficient to establish probable cause to believe that the Defendant was importing, transporting, or selling obscene matter, and the warrant contains no findings by the magistrate judge as to which specific materials were "obscene". These contentions are obscure, in that the search warrant issued by the magistrate judge does not even mention, much less

authorize the seizure of, any books, magazines, photographs, film, or video tapes, obscene or otherwise. While it is true that the 55-page search warrant affidavit does make occasional references to obscene matter (Search Warrant Affidavit, pp. 7; 11; 55) and alleges that Defendant Coil and a co-Defendant named Curtis Wayne Castro have been convicted for possession or sale of obscene matter (Affidavit, pp. 7; 18), the Court finds those references to be mere surplusage. If there was sufficient probable cause to find that the financial records which were the subject of the search warrant would reveal a pattern of willful failure to pay income taxes on earned income, or a pattern of transferring and concealing assets for the purpose of evading and defeating the payment of a tax, whether the taxable income was derived from the sale of obscenity, or sexually explicit materials, or adult oriented materials, or some other items entirely, would not be material.

Finally, the Defendant contends that all fruits of the search of his building should be suppressed because the manner in which the search warrant was executed was unreasonable under the Fourth Amendment. It is certainly true that the reasonableness requirement of the Fourth Amendment speaks to the manner of execution of a warrant as well as to the issuance thereof. **Wilson v. Arkansas**, 524 U.S. 927 (1995). In the instance case, it is undisputed that the agents arrived at the Defendant's doorstep prepared to execute a search warrant which was invalid because the magistrate judge who issued it did not have authority to issue warrants in the Northern District of Texas. See Rule 41(b)(1), Federal Rules of Criminal Procedure. When the agents became aware of this fact, the search did not proceed. Instead of searching, the agents

simply remained in and about the building as they waited for a valid search warrant to be issued. the only occupant of the building, the Defendant's receptionist, continued about her work without interference. She was, of course, instructed not to destroy or tamper with any files or records which might be covered by the search warrant. About four hours later, the agents were informed that a new, valid search warrant had been issued, and the search commenced. Considering the very unusual circumstances, these actions were not unreasonable. Officers possessing probable cause to conduct a search may secure the premises subject to the search in order to preserve the status quo while other officers are in the process of obtaining a search warrant. **Segura v. United States**, 468 U.S. 796, 805-06 (1984). Since the officers had announced their authority and purpose and secured admission to the premises before discovering the defect in the search warrant, the circumstances were certainly exigent. The Defendant's employee was in a position to destroy evidence subject to seizure if the agents had not maintained the status quo while awaiting the arrival of the new search warrant. Finally, the affidavit on the basis of which the new, valid search warrant was issued did not rely for its probable cause on any fact obtained or observation made by the agents after their entry upon the premises. In other words, the probable cause supporting this issuance of the new search warrant was secured from the sources independent of the alleged illegality. **Segura**, 468 U.S. at 805-06.

Assuming for the sake of argument that the search warrant was deficient or that the manner of its execution was unauthorized, suppression of the evidence would be denied because the agents acted in good faith. The Fourth

Amendment does not bar the introduction of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate even if it is later found to be invalid for lack of probable cause. **United States v. Leon**, 468 U.S. 897 (1984). In this case, the warrant upon which the search was based was issued by a neutral and detached magistrate judge with authority to issue warrants in the Northern District of Texas. There is no evidence that false information was furnished to the magistrate judge, nor that the officers who executed the search warrant were acting in anything other than objective good faith reliance upon it. Furthermore, upon discovering the strong possibility that the first search warrant was issued by a judicial officer lacking authority in the district of search, the agents consulted with an Assistant United States Attorney, went before another magistrate judge, and secured a second search warrant before actually proceeding to search. This series of events further indicates objective good faith on the part of the agents executing the warrants.

It is therefore ORDERED that the motion of Defendant John Kenneth Coil to suppress evidence in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 27th day of February, 2004.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO.
v.	)	W-03-CR-197 (1)H
JOHN KENNETH COIL,	)	
	)	
Defendant.	)	

PLEA AGREEMENT

(Filed Jun. 11, 2004)

In compliance with Rule 11(e)(2) of the Federal Rules of Criminal Procedure, the United States Of America wishes to acknowledge the following agreement between the United States Attorney's Office for the Western District of Texas, the Defendant John Kenneth Coil and the Defendant's counsel.

1. The Defendant has agreed to enter a plea of guilty to Count Nine of the Superseding Indictment that charges a violation of Title 18, United States Code, Section 1465 – transportation of obscene matters for sale or distribution and to Count Twenty-Three of the Superseding Indictment that charges a violation of Title 18, United States Code, Section 1341 – mail fraud.

2. The United States Attorney for the Western District of Texas has agreed that should the Court accept the Defendant's plea of guilty to said Counts the United States Attorney for the Western District of Texas, after sentencing, would move to dismiss the charges remaining against this Defendant in this case. The United States

Attorney for the Western District of Texas has also agreed not to pursue further Title 18 or 26 offenses against this Defendant with regard to the facts that gave rise to the Indictment in this case.

3. The United States of America has made no agreement with the Defendant or his counsel, concerning any possible sentence. The United States of America specifically reserves its right to speak at sentencing under Rule 32(a)(1) of the Federal Rules of Criminal Procedure.

4. The Defendant will give a full, complete, and truthful statement to law-enforcement authorities concerning his knowledge of the charges in the Indictment as well as any other criminal activity. It is specifically agreed and understood that this plea agreement contemplates the full and honest cooperation of the Defendant at all times, and that this agreement does not immunize or insulate him from penalties of perjury, making false statements, or obstruction of justice in connection with this or other investigations and trials. Any subsequent prosecutions against John Kenneth Coil by the United States Attorney for the Western District of Texas shall not be based upon statements, testimony, or cooperation of John Kenneth Coil which is derived from this agreement. Statements of John Kenneth Coil and evidence derived therefrom may, however, be used in cross-examination or rebuttal in any proceeding should Defendant testify, and may be used against John Kenneth Coil in a prosecution for *any* offense *if* he violates any provisions of this agreement.

5. The Defendant agrees that he will pay the $200 special assessment required by Victims of Crime Act immediately after sentencing. Further, the Defendant

agrees to give to law enforcement officers a full and complete financial statement.

6. The Defendant hereby agrees to forfeit to the Bureau of Immigration and Customs Enforcement and to the Internal Revenue Service, agencies of the United States any and all interest he has in the real property located within the State of Texas that is described in the Superseding Indictment. In addition, the Defendant agrees to forfeit any and all ownership, in or other interest he has in the stores owned by the companies, corporations or partnerships named in the Superseding Indictment that are operated within the State of Texas, including any partnership interest therein, stock, inventory, fixtures, VCPs, etc., EXCEPT that the Defendant shall retain all right, title and interest he has in the inventory (i.e. video tapes, DVDs, and other merchandise his stores offer for sale) within the Southern District of Texas.

Defendant John Kenneth Coil agrees and stipulates that the above-described properties (real and personal) are subject to forfeiture to the United States of America for violations of Title 18 U.S.C. §§ 1465 and 1467; that he owns (or has an interest in) said properties; and that he has no objection to, and does not contest the forfeiture of all his right, title and interest in the aforementioned described properties to the United States of America.

Defendant John Kenneth Coil further agrees and stipulates to execute and deliver to the United States of America any and all documents deemed necessary by counsel for the United States of America to accomplish the forfeiture of the above-described properties including those held in nominee names, as set forth in this Plea Agreement, including but not limited to any waivers,

withdrawals of claim, settlement agreements, execution of a consent decree, surrender of titles, special warranty deeds, deeds, and/or motions to be filed in the instant criminal action. Defendant agrees to take all steps as requested by the United States to pass clear title to forfeitable assets to the United States, and to testify truthfully in any judicial forfeiture proceeding. Such documents shall be executed by the Defendants on or before August 1, 2004.

Defendant John Kenneth Coil further agrees and, stipulates that the facts which are set forth in the Factual Basis of this Plea Agreement executed by said Defendant are true and correct and establish that the above-described properties are subject to forfeiture pursuant to Title 18 U.S.C. §§ 1465 and 1467.

The Defendant John Kenneth Coil further agrees to waive all interest in any such asset in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. The Defendant John Kenneth Coil agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Defendant John Kenneth Coil acknowledges that he understands that the forfeiture of assets is part of the sentence that may be imposed in this case and waives any failure by the court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted.

The Defendant John Kenneth Coil further agrees to waive all constitutional and statutory challenges in any

manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment.

7. Defendant is aware that his sentence will be imposed in conformity with the *Federal Sentencing Guidelines and Policy Statements.* The Defendant is also aware that a sentence imposed under the Guidelines does not provide for parole. Knowing these facts, Defendant agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense, including a sentence determined by reference to the Guidelines.

8. The Defendant is also aware that his sentence has not yet been determined by the Court. The Defendant is aware that any estimate of the probable sentencing range that he may receive from his counsel, the government or the probation office, is a prediction not a promise, and is not binding on the government, the probation office or the Court.

9. The government and the Defendant reserve the right to: (1) bring their version of the facts of this case to the attention of the probation office in connection with that office's preparation of a presentence report; (2) dispute sentencing factors or facts material to sentencing in the presentence report; and (3) seek resolution of such factors or facts in conference with opposing counsel and the United States Probation Office.

10. This agreement is only binding to the parties, those being the United Stases Attorney for the Western District of Texas and the Defendant. The Defendant acknowledges his full understanding that by this plea

agreement, no representations or agreements have been made or entered into with any other United States Attorney or state prosecutor concerning other possible offenses or charges.

11. The United States agrees to make known to the Court, prior to sentencing, the nature and extent of the Defendant's cooperation concerning this investigation, and of any other matters in which he may provide assistance. If the Defendant fully complies with the terms of this plea agreement, and in addition provides substantial assistance to the United States in this and other criminal investigations, the United States Attorney for the Western District of Texas may file a motion for downward departure pursuant to U.S.S.G. § 5K1.1. The Defendant understands that the decision to file a 5K1.1 motion is in the sole discretion of the United States Attorney for the Western District of Texas. The Defendant further understands that the Court will determine the merit of any such motion, the Court is not bound by such a motion and could overrule any such motion filed by the United States Attorney for the Western District of Texas.

12. Should the Defendant fail to meet his obligations under this agreement, the United States Attorney for the Western District of Texas would be released from any duty to comply with this plea agreement.

13. This agreement constitutes the entire agreement between the United States Attorney for the Western District of Texas, the Defendant, and his counsel. It cannot

be modified except in a writing signed by all parties, or done in open Court.

JOHNNY SUTTON
UNITED STATES ATTORNEY

By: /s/ Mark H. Marshall
MARK H. MARSHALL
Assistant U. S. Attorney
816 Congress Avenue, Ste. 1000
Austin, Texas 78701
State Bar No. 13032500

/s/ John Kenneth Coil	[Illegible]
JOHN KENNETH COIL	Date
Defendant	
/s/ John Fahle	10 June 2004
JOHN FAHLE	Date
Attorney	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	CRIMINAL NO. W-03-CR-197(1)H
v.	)	
JOHN KENNETH COIL, Defendant.	)	

FACTUAL BASIS

Had this matter proceeded to trial, the United States Attorney was prepared to prove the following facts:

1. Defendant John Kenneth Coil distributes sexually explicit materials in the United States. He controls a chain of adult bookstores and arcades which operate within the State of Texas and elsewhere.

2. Between October 1996 and December 1999, Internal Revenue Service-Criminal Investigation Division (IRS) special agents and other law enforcement officers visited at least 20 stores owned, controlled and operated by John Kenneth Coil in Texas. The agents observed that these stores sold or exhibited sexually explicit materials.

3. Coil's adult bookstores normally operated with a "front" room and a "back" room. The "front" room sells and/or rents sexually explicit videos, movies, books, and magazines. Also sold in the "front" room are sexually oriented paraphernalia, such as, dildos, massage oils, and leather goods. John Kenneth Coil's stores typically display a variety of sexually explicit videos and magazines which may be rented, purchased or selected for viewing in the

store. These videos and magazines graphically display a variety of male/female, male/male, female/female sexual acts, which include genital/genital, oral/genital, genital/anal, and/or oral/anal sexual contact. There are also scenes of multiple partners performing varied sexual acts. Videos and magazines showing graphic displays of masturbation with foreign objects, masochism/domination, multiple sexual partners and multiple penile/object penetration of the mouth, vagina or anus are also available for rent or sale.

4. The "back" room operation consists of adult video arcades. Agents visited at least 16 of these arcades on a periodic basis since 1996. The last visit occurred in 2002. The arcades consist of booths which contain a Video Cassette Player (VCP) and a seat or bench. For one token, the VCP will display 30-90 seconds of a segment from a sexually explicit video. One token costs 25 cents, although in some locations the VCP will accept quarters (1 play) and dollar bills (4 plays). A typical arcade will have 24 to 50 channels exhibiting video of different sexual activity. The customer is generally required to purchase a minimum number of tokens, usually $2-5, to gain access to the arcade. Some of the stores also contain "preview" rooms where a customer can view a full-length sexually explicit video for $6-10. These rooms are larger than arcade booths and contain a sofa or bench. After the customer has spent the initial tokens or quarters purchased, the token machine in the "back" room will dispense additional tokens in exchange for 1,5,10 or 20 dollar bills. Goalie Entertainment, Inc. operated many of Coil's back rooms under service agreements, which called for a split of the arcade income based upon a set percentage.

5. Many of the videos available for rental, sale or private viewing are apparently obscene and were shipped in interstate commence. Moreover, in visiting the arcades in at least 6 of Coil's stores as late as January, 2003, agents found that the booths in which the VCP's are located are often littered with condoms, and what appears to be male ejaculate. Thus, the arcades are designed to appeal to a prurient interest and lack serious literary, artistic, political or scientific value.

6. Specifically, agents purchased the following video tapes or DVDs at the Rex Temple locations on the dates noted below.

Title	Distributor	Location Purchased	Date Purchased
1. NYMPHO BRIDE	Video Team Van Nys, CA	Harker Heights, TX	7-10-03
2. GANG BANG ANGELS #16	Elegant Angel Entertainment Chatsworth, CA	Harker Heights, TX	3-07-03
3. GANG BANG SLUT #7	Al Borda Video Highstown, NJ	Austin, TX	1-23-03
4. YOUNG, DUMB AND FULL OF CUM	Zane Entertainment Canoga Park, CA	Round Rock, TX	1-23-03
5. ANAL AUDITIONS #4	Max Hardcore Production Altadena, CA	Dallas, TX	3-28-97

These depictions are representative of the videos and DVDs sold or available for viewing or purchased in John Kenneth Coil's stores. Agents established that each of

these depictions had been produced outside of the state of Texas, and shipped in interstate commerce to the location at which they were purchased by agents. Each of these videos contain sexually explicit depictions of individuals engaged in obscene, lewd and lascivious behavior. This behavior includes anal sex followed immediately by oral sex; oral/anal sex; genital-to-genital contact; oral/genital contact, genital-to-anal contact; all involving single and multiple participants. Summaries of these videos are attached.

7. From 1988 until the present, Coil structured his business enterprise into a complex, interwoven network of corporations with nominee or non-existent stockholders in an attempt to (1) conceal his ownership and control of these corporations, the assets they own, and the income they generate; (2) expand and enlarge the size of his enterprise by using income never reported to the Internal Revenue Service upon which taxes due and owing were not paid for the acquisition of additional outlets; (3) negate any tax consequences by manipulating and hiding income of the corporations he controlled; and (4) insulate himself and his enterprise from law enforcement and regulatory activities. Coil has conspired with others, known and unknown, including Katherine Dagnino and John Altair Coil, to impair and impede the IRS in the assessment and collection of corporate and personal income taxes generated by his enterprise.

8. Coil started his adult entertainment business in the early 1980's by transferring assets and properties into a corporation called Louisiana Development, Inc. This company owned the real estate upon which Coil operated his adult bookstores. Louisiana Development was replaced by Sun Development in 1988. Sun Development was

replaced by Sun Realty Management in 1995. Coil titled real estate in the names of nominees, both corporate and personal, to conceal his ownership. Coil failed to file tax returns for these "real estate companies" thereby evading the payment of income tax on rent payments received from his "operating companies."

9. Coil incorporated a second set of corporations to conduct the day to day activities of the bookstores, hereafter referred to collectively as the "operating companies." Coil used the names of straw parties and childrens' trusts to hold the stock in these corporations which hid his ownership of the enterprise. The operating companies funneled monies to the real estate companies through "rent" payments. In many instances these "rent" payments were inflated and eliminated any profits at the operating company level.

10. In December 1988, Coil incorporated a non-profit religious entity, Trinity Christians of America, Inc., which operated two adult bookstores in Louisiana, for profit. Between the years 1992 and 1996, Trinity Christians transferred in excess of two million dollars to the real estate company(s). Approximately $1.5 million of these funds were characterized as "loans." Coil failed to file federal income tax returns for Trinity Christians.

11. The real estate companies used the rent/loan payments to fund the purchase of new outlets. These acquisitions took one of four forms: (1) the purchase of raw land and constructed adult bookstores on those properties; (2) the purchase of existing bookstores; (3) the purchase of corporate stock in companies operating bookstores; or (4) the acquisition of existing stores under lease/purchase arrangements.

12. On December 13, 1999, special agents of the IRS Criminal Investigation Division executed search warrants on eight locations in the Northern and Eastern Judicial Districts of Texas. These locations consisted of the personal residences of Coil and his family, his close business associates and bookkeepers, and his corporate offices. A large volume of records were seized which consisted of the business and personal records of Coil, his immediate family, and a large number of corporate business entities. Coil maintained individual files of business transactions, bank account information, and corporate records.

13. Coil employed several bookkeepers that maintained records of the individual corporations and the stores that they operated. The bookkeepers managed the day to day affairs of the corporations and the stores which included maintaining the bank account records, recording income and expenses, issuing payroll checks, and making corporate filings with the state, such as, sales tax and franchise tax returns. The bank accounts for each individual corporation were used as a cash receipts and disbursement ledger. Income was based upon bank deposits and disbursements by check classified into various expense accounts. Based upon these activities the bookkeepers produced Profit and Loss Statements upon, which tax returns were based.

14. Coil prepared his own personal Form(s) 1040 for the years 1995 through 1999. Coil employed a Certified Public Accountant, Ward Beebe, to prepare corporate tax returns, Form(s) 1120, for his numerous corporate entities. Coil employed several bookkeepers, including his daughter Katherine Dagnino, over the years to maintain records for corporations, which operated the individual bookstores. Beebe stated that Coil's bookkeepers were of little help

during the preparation of the returns and that Coil provided all the important and/or pertinent information and documents he requested.

15. Beebe was provided handwritten and/or computer generated summary sheets of corporate activity for a given year and almost never was provided any underlying documentation or records. Beebe obtained any additional information he needed verbally or in writing directly from John K. Coil. Beebe provided his workpaper files, which included notes and other documentation, provided by Coil during the preparation of the returns. In later years the bookkeepers employed Excel Worksheets and then Quickbooks bookkeeping programs to track income and expenses of the various entities. Using these taxpayer records, Beebe prepared Working Trial Balance Sheets. Based upon additional information supplied by Coil, Beebe would make adjusting journal entries to arrive at the individual line items for the returns.

16. Beebe prepared returns for the real estate holding companies, but those returns were never filed. Coil maintained the books and records for the real estate holding companies and for Trinity Christians of America.

17. All of the evidence gathered pursuant to this investigation has established that the tax liability (and thus the tax loss to the United States) for Trinity Christians of America and the remainder of the real estate and operating companies for which John Kenneth Coil is liable amounts to more that $2,500,000 but less than $5,000,000. These entities finally ceased operation in 1999. Thus, entities finally ceased operation in 1999. Thus, the unreported income constituted income to John Kenneth Coil in that year.

18. As part of the scheme to defraud the United States described in the Superseding Indictment, on or about October 18, 2000 Defendant John Kenneth Coil subscribed and executed a 1999 Form 1040, Joint Individual Income Tax Return with his wife. An amended 1999 Joint Individual Income Tax Return, Form 1040, was subscribed and executed by the Defendants on or about December 11, 2000. Both Forms 1040 were filed with the IRS. The return was amended to include social security numbers for their children. The Defendants stated that their joint taxable income for said calendar year was $91,313, and the tax due and owing thereon was $19,725.

Thus, John Kenneth Coil subscribed and mailed to the Internal Revenue Service a false 1999 Joint Individual Income Tax Return, Form 1040, knowing that his taxable income was far in excess of that reported as part of the scheme to defraud the United States described in the Superseding Indictment.

That in summary would be the evidence presented by the United States.

JOHNNY SUTTON
United States Attorney

/s/ Mark H. Marshall

MARK H. MARSHALL
Assistant U. S. Attorney
State Bar No. 13032500

I have read the United States Factual Basis, and reviewed it with my attorney. I hereby admit that all of the allegations contained in the Factual Basis are true and

correct and that I am guilty of the offenses charged in the indictment.

/s/ John Kenneth Coil	
JOHN KENNETH COIL	Date
Defendant	
/s/ John Fahle	10 June 2004
JOHN FAHLE	Date
Attorney	

18 U.S.C. § 1465. Transportation of obscene matters for sale or distribution

Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	)	Docket No. W 03-CR-197(1) H
vs.	)	Waco, Texas
JOHN KENNETH COIL	)	June 11, 2004

TRANSCRIPT OF REARRAIGNMENT/PLEA
BEFORE THE HONORABLE HARRY LEE HUDSPETH

APPEARANCES:

For the United States:	Mr. Mark H. Marshall Assistant U.S. Attorney 816 Congress Avenue, Suite 1000 Austin, Texas 78701
For the Defendant:	Mr. John Fahle 628 South Presa San Antonio, Texas 78210
Court Reporter:	Ms. Lily Iva Reznik, RPR, CRR 200 W. 8th Street Austin, Texas 78701 (512) 916-5564

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[9] THE DEFENDANT: Yes, sir.

THE COURT: And I'm sure you do understand and you do know that the latest scheduling of that trial was for the 14th of June?

THE DEFENDANT: Yes, sir.

THE COURT: You know that. And you understand that on that date, a jury panel would be present and that you would have had the right to exercise your right to trail by jury?

THE DEFENDANT: Yes, sir.

THE COURT: And you further understand that if you enter these pleas of guilty and I accept those pleas, you will give up that right to a trial by jury.

THE DEFENDANT: Yes, sir.

THE COURT: You also understand, I'm sure, that you will give up the right to confront and cross-examine the witnesses against you in this case. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you'll give up the right to call your own witnesses to testify in your defense?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you'll give up your right to remain silent?

THE DEFENDANT: Yes, sir.

THE COURT: And the plea agreement, which I just saw at the last minute, does it contain a waiver of appeal or not?

[10] MR. FAHLE: It does not, your Honor, only just as in John A. Coil's: it's only as to the forfeiture issues.

MR. MARSHALL: That's correct.

THE COURT: All right. No waiver of appeal from the sentence imposed in the case is what I was getting at.

What about – well, we've already reviewed the issue of mental competency. I've made a finding on the record of mental competency, which was that Mr. Coil is presently competent to either stand trial or to enter a plea of guilty. Has there been any change in that situation?

MR. FAHLE: I do not believe there has, your Honor.

THE COURT: You believe that, at this moment, as was true a month ago, he is mentally competent as the law defines that term?

MR. FAHLE: I believe so, your Honor.

MR. MARSHALL: I agree, your Honor.

THE COURT: Mr. Coil, do you agree?

THE DEFENDANT: Yes.

THE COURT: All right. Let's take the counts one-by-one. First is Count 9. To the charge contained in that count, how do you plead?

THE DEFENDANT: Sir?

THE COURT: How do you plead to Count 9, guilty or not guilty?

THE DEFENDANT: Oh, guilty.

* * *